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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 193 192

JOSHUA F. SIMONS, WILLIAM MARKOWITZ and SAMUEL MARKOWITZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

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JOSHUA F. SIMONS, WILLIAM MARKOWITZ and SAMUEL MARKOWITZ,

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Respondent.

PETITION.

To the Honorable, The Supreme Court of the United States:

Joshua F. Simons, William Markowitz and Samuel Markowitz, the above named petitioners, pray that a writ of certiorari be issued by this Court to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, entered on the 21st day of April, 1941, affirming a judgment of the United States District Court for the Western District of Washington, Southern Division [R. 1999-2000], and in this behalf petitioners respectfully show:

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was filed on April 21, 1941, and is found in the record at pages 1944 to 1999.

Within the time allowed by law and on May 17, 1941, petitioners filed in said Court a petition for rehearing which was denied on May 22, 1941 [R. 2000].

Jurisdiction.

This Court has jurisdiction by virtue of the provisions of subdivision (a) of Section 240 of the Judicial Code as amended by the Act of February 13. 1925, c. 229, §1, 43 Stat. 938; 28 U. S. C. A. 347.

Statement of the Case.

1. The Circuit Court of Appeals affirmed the convictions and sentences of the petitioners on thirteen counts of an indictment which contained charges as follows:

Counts 1 to 10, inclusive, using the United States mails in furtherance of a scheme to defraud.

Counts 11 and 12, employing the said scheme and artifice to defraud, in the sale of a security by the use of the United States mails, in violation of the Securities Act of 1933, as amended.

Count 13, conspiring to use the United States mails in furtherance of a scheme and artifice to defraud and to employ the said scheme and artifice in the sale of a security by means of the United States mails.

2. The sentences affirmed were as follows:

JOSHUA F. SIMONS.

On each of counts 1 to 10 inclusive, imprisonment in a United States penitentiary for five years and a fine of $1,000.00; the sentences of imprisonment to run concurrently each with the others.

On counts 11 and 12, imprisonment in a United States penitentiary for one year and one day to run concurrently one with the other, but consecutively to the sentences of imprisonment imposed on counts 1 to 10 inclusive.

On count 13, imprisonment in a United States penitentiary for a period of two years to run consecutively to the sentences of imprisonment imposed on counts 11 and 12.

Petitioner Simons is therefore sentenced to imprisonment aggregating eight years and one day, and to pay fines totaling $10,000.00 [R. 188-93].

WILLIAM MARKOWITZ.

On each of counts 1 to 10 inclusive, imprisonment in a United States pententiary for five years and a fine of $1,000.00: the sentences of imprisonment to run concurrently each with the others.

On counts 11 and 12, imprisonment in a United States penitentiary for one year and one day to run concurrently one with the other, but consecutively to the sentences of imprisonment imposed on counts 1 to 10 inclusive.

On count 13, imprisonment in a United States penitentiary for a period of two years to run con-

secutively to the sentences of imprisonment imposed on counts 11 and 12.

Petitioner William Markowitz is therefore sentenced to imprisonment aggregating eight years and one day, and to pay fines totaling $10,000 [R. 183-88].

SAMUEL MARKOWITZ.

On counts 11 and 12, imprisonment in a United States penitentiary for one year and one day; the sentences to run concurrently one with the other.

On count 13, imprisonment in a United States penitentiary for two years to run consecutively to the sentences imposed on counts 11 and 12.

Petitioner Samuel Markowitz is, therefore, sentenced to imprisonment aggregating three years and one day [R. 181-82].

3. Count 1 charges that the petitioners and others used the United States mails in furtherance of a scheme and artifice to defraud [R. 3 *et seq.*]. It is not necessary, for the purpose of presenting the points upon which this petition is based, to describe in detail either the scheme or the means intended to be employed for carrying it out.

4. Counts 2 to 10 inclusive, each charges the mailing of a different letter in furtherance of the said scheme and artifice [R. 24-54].

5. Counts 11 and 12 charge the use and employment of the said scheme and artifice in the sale of a security by the use of the mails [R. 54-66].

6. Count 13 charges a conspiracy to use the United States mails in furtherance of the said scheme and artifice and to employ the said scheme and artifice in the sale of a security by use of the mails [R. 66-74].

7. The trial of this cause commenced on February 14, 1939 [R. 397], and the plaintiff rested its case on July 24, 1939 [R. 1828]. During this period of approximately five and one-half months, 127 witnesses were called by the plaintiff [R. viii to xxv]. The testimony of these witnesses covered approximately 8,000 typewritten pages of transcript [R. 1855]. During the examination of these witnesses the plaintiff introduced 619 documentary exhibits [R. 1772] and 286 such exhibits were introduced by defendants [R. ii].

Each of the defendants rested his case without testifying or calling any witness.

The cause was partially argued [R. 1844] and on July 31, 1939, the trial was continued until August 9, 1939, because of the illness of the Honorable Edward E. Cushman, the Judge presiding at the trial [R. 1844].

On August 9, 1939, Judge Cushman was still too ill to preside at said trial [R. 1862]. On that date Court was convened by the Honorable Leon R. Yankwich, Judge of the District Court of the United States for the Southern District of California, who had been theretofore designated and appointed to sit in the United States District Court for the Western District of Washington [R. 1844-45].

Each attorney in the case, and each defendant thereupon stipulated, both in writing and orally in open Court, that Judge Yankwich might conclude the trial in the place and stead of Judge Cushman, and each of them signed a stipulation which contained the statement that they waived "any and all legal and constitutional rights which they may have or might have by reason of the substitution * * *" [R. 1846-64, incl.]. Thereafter, a typewritten transcript of the testimony and the exhibits which had theretofore been admitted in evidence, were furnished to and read by Judge Yankwich [R. 1864].

On August 14, 1939, the trial was resumed with Judge Yankwich presiding [R. 1863], and the arguments were completed and Judge Yankwich instructed the jury [R. 1869].

The Question Presented.

The situation disclosed by the foregoing facts raises the question of whether the substitution, pursuant to stipulation and after all the evidence had been taken, of one judge for another in the course of the trial of a criminal case before a jury, and the instruction of the jury by the substituted judge who had not seen the witnesses nor heard their testimony but had merely read it, deprived petitioners of their constitutional right to trial by jury, or is such a departure from established judicial procedure as to deprive the petitioners of their liberty without due process of law.

Reasons for Granting the Writ.

I.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question of whether one judge may, pursuant to stipulation and after all the evidence has been taken, be substituted for another in the trial of a criminal case before a jury, and the jury be instructed by such substituted judge, who has not seen the witnesses nor heard their testimony but has merely read it, is an important one which has never been, but should be, settled by this Court.

II.

THE CIRCUIT COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The Circuit Court of Appeals in this case decided that the substitution, pursuant to stipulation and after all the evidence had been taken, of one judge for another in the trial of a criminal case before a jury, and the instruction of the jury by such substituted judge, who had not seen the witnesses nor heard their testimony but had merely read it, did not deprive petitioners of their constitutional right to trial by jury, nor deny to them due process of law.

This decision is directly in conflict with a decision of the Circuit Court of Appeals, for the Second Circuit. In *Freeman v. United States,* 227 Fed. 732, that Court reversed a conviction in a criminal case because of the substitution of one trial judge for another in a like situation.

III.

THE CIRCUIT COURT OF APPEALS HAS SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The substitution of one judge for another, pursuant to stipulation and after all the evidence has been taken, in the trial of a criminal case before a jury and the instruction of the jury by such substituted judge, who has not seen the witnesses nor heard their testimony but has merely read it, is such a departure from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition should be granted and a Writ of Certiorari issue to the Circuit Court of Appeals for the Ninth Circuit.

MARK L. HERRON,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1941.

No.....

JOSHUA F. SIMONS, WILLIAM MARKOWITZ and SAMUEL MARKOWITZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed in the record at pages 1944 to 1999.

II.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 21, 1941 [R. 1999-2000]. A petition for rehearing was duly filed and was denied by the Court on May 22, 1941 [R. 2000]. This Court has jurisdiction under the provisions of subdivision (a) of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938; 28 U. S. C. A. 347.

III.

Statement.

A full statement of the facts giving rise to the sole question here presented appears in the petition, and, in the interest of brevity, is not repeated here.

IV.

Specification of Error.

The Circuit Court of Appeals erred in holding that the substitution, pursuant to stipulation and after all the evidence had been taken, of one judge for another in the course of the trial of a criminal case before a jury, and the instruction of the jury by the substituted judge, who had not seen the witnesses nor heard their testimony, but had merely read it, did not deprive petitioners of the right of trial by jury as guaranteed by Article III, Section 2, clause 3 of, and the Sixth Amendment to, the Constitution of the United States, or of due process of law as guaranteed by the Fifth Amendment.

V.

Argument.

The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

Due process of law in a criminal proceeding requires "a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure, and discharge unless found guilty" (16 C. J. S., Constitutional Law, Sec. 579, p. 1171, and cases cited).

Article III, Section 2, clause 3 of, and the Sixth Amendment to, the Constitution of the United States guarantee to the accused in a criminal prosecution the right to a trial by an impartial jury.

This trial was a protracted one, during which the plaintiff called 127 witnesses [R. viii to xxv].

Judge Yankwich neither heard nor saw any of them. He merely read their testimony. He was not, therefore, in a position to pass upon the credibility of any of them.

Freeman v. U. S., 227 Fed. 732 at 756-59.

Judge Yankwich acknowledged his inability to advise the jury on the facts by instructing the jury as follows:

> "* * * The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case.
>
> However, it is not my custom to exercise this right nor shall I exercise it in the present case. You have heard the evidence and seen the witnesses. I have merely read the evidence * * *" [R. 1869-70].

A judge presiding over the trial of a criminal case before a jury, is not required, in all cases, to advise the jury on the facts. He must, however, be empowered to do so and must, in the exercise of a sound judicial discretion, determine whether the case is a proper one in which to so advise the jury, and must likewise be empowered

(except on acquittal) to set aside the verdict of the jury if, in his opinion, it is against the law or the evidence.

Patton v. U. S., 281 U. S. 276 at 289, 74 L. Ed. 854 at 858;

Capital Traction Co. v. Hof, 174 U. S. 2 at 13, 43 L. Ed. 873 at 877;

Galatas v. U. S. (C. C. A. 8), 80 F. (2d) 15 at 24, certiorari denied, 297 U. S. 711, 80 L. Ed. 998;

Hartzell v. U. S. (C. C. A. 8), 72 F. (2d) 569 at 586, certiorari denied, 293 U. S. 621, 79 L. Ed. 708;

U. S. v. Brown (C. C. A. 2), 79 F. (2d) 321 at 325;

Trefone v. U. S. (C. C. A. 10), 67 F. (2d) 954 at 955;

Lewin v. U. S. (C. C. A. 1), 62 F. (2d) 619 at 620;

Dillon v. U. S. (C. C. A. 2), 279 Fed. 639 at 643.

In these and many other cases this Court and the Circuit Courts of Appeals have held that a Federal Judge has the "right," "power" or "duty" to advise the jury on the facts. A judge has no "rights" in the proceedings, except the right to perform his duties. Therefore, to say that a Federal Judge has the "right" to advise the jury on the facts, is merely to say he has the authority and power, and that it is his duty, in the exercise of a sound judicial discretion, to do so.

How can a judge advise a jury on the facts, or determine whether or not he should do so when he does not

know *all* of the facts? In this case, while Judge Yankwich knew what the witnesses had said, he did not know how they had said it. The demeanor of a witness on the stand may be as important as any other evidence in the case.

> *Freeman v. U. S.* (C. C. A. 2), 227 Fed. 732 at 759.

It cannot be validly urged that, because the defendants did not call witnesses in support of their defense, it may be presumed that there was no conflict in the evidence. The question of whether there was such a conflict cannot be answered by a mere reading of the cold printed record, for there may be a conflict between the words used by a witness and his demeanor on the stand. His very manner and attitude may contradict and impeach his words.

If this were not the case, and if it could be presumed that there was no conflict in the evidence, petitioners would have been nevertheless entitled to a judge fully empowered to advise the jury on the facts. While a judge may not be *required* to advise the jury on the facts, he must be *empowered* so to do.

> *Patton v. U. S., supra;*
> *Capital Traction Co. v. Hof, supra.*

A judge of a Federal Court is not a mere moderator but is required to take an active part in the trial of a case in order to see that the truth is developed.

> *Herron v. So. Pac. Co.*, 283 U. S. 91 at 95, 75 L. Ed. 857 at 860;
> *U. S. v. Lee* (C. C. A. 7), 107 F. (2d) 522;
> *Quercia v. U. S.*, 289 U. S. 466 at 469, 77 L. Ed. 1321 at 1324.

Judge Yankwich was not empowered to perform either of these functions, and we submit that a trial in part presided over by a judge not empowered to perform *all* the duties of a judge,—not one of them, not most of them, but *all* of them,—is not a trial by a court "fully organized and competent for the transaction of business."

Patton v. U. S., supra;
Capital Traction Co. v. Hof, supra;
Herron v. So. Pac. Co., supra.

United States District Courts are the creatures of Statute, not the Constitution, and it is necessary to examine the statute to determine the powers of a substituted judge (*Patton v. United States, supra*). This subject is regulated by 28 U. S. C. A., Sec. 776, which provides in substance, that in case of the disability of the trial judge to hear and pass upon a motion for a new trial and allow and sign a bill of exceptions, his successor or any other qualified judge, shall do so, if the evidence was taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon said motion and allow a true bill of exceptions; but in case such judge is not so satisfied, he may in his discretion grant a new trial to the party moving therefor.

Prior to the enactment of this statute, and on December 4, 1899, this Court held in *Malony v. Adsit*, 175 U. S. 281 at 284, 44 L. Ed. 163 at 165, that "allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial," and this statute was passed to meet the situation thus presented. (See also *Norwood v. U. S.* (C. C. A. 4), 18 Fed. (2d) 577.)

The fact that this statute expressly empowers a substituted judge to pass upon a motion for a new trial and to settle a bill of exceptions but does not authorize him to perform any other function in connection with a criminal case which has been tried, or partially tried, evidences a clear Congressional intent to limit the powers of such substituted judge to those expressly conferred by this statute.

It required Congressional authority to empower a judge other than the one who sat at the trial to settle and allow a bill of exceptions, and this Court further held that no other judge could be so "empowered" by stipulation of the parties (*Malony v. Adsit,* 175 U. S. 281 at 287; 44 L. Ed. 163 at 166).

Since without Congressional authority a judge, other than the one who sat at the trial, may not by stipulation of the parties, be empowered to settle and allow a bill of exceptions in a civil case, it must necessarily follow that no judge other than the one who sat during the entire trial of a criminal case, may be empowered by stipulation of the parties to instruct the jury (a more important function) in the absence of any statute purporting to empower the judge so to do.

In considering the effect of the stipulation for the substitution of Judge Yankwich, we believe it only necessary to observe that if Judge Yankwich was empowered, by virtue of his commission as a United States District Judge and his designation and appointment to sit in the Western District of Washington [R. 1844-46], to perform all the duties of a trial judge in the instant case, no such stipulation was necessary and the substitution could have been made over the objection of the defend-

ants. If he was not so qualified, authorized and empowered, the stipulation did not, and could not, make him so.

This Court has held that a defendant may waive trial by jury (*Patton v. United States, supra*). But in this case, trial by jury was not waived. Nevertheless, the defendants did not have what this Court has defined trial by jury to be in *Patton v. United States* and *Capital Traction Co. v. Hof, supra,* because the trial was not by a jury "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."

In *Freeman v. United States, supra,* the trial judge became incapacitated by illness after most of the evidence had been taken. Another judge was substituted, upon stipulation, and the trial proceeded, resulting in a conviction. The conviction was reversed on the ground that the instruction of the jury by a judge who had not heard the evidence but had merely read it, deprived the defendants of the right of trial by jury and denied to them due process of law. It is true that some of the *obiter dicta* contained in the opinion in that case is incompatible with the decision of this Court in the *Patton* case, but the *decision* in the *Freeman* case, and the reasons on which it was based, are entirely consistent, not only with the *Patton* case but with every other decision of this Court.

The *Patton* case does not hold that there may be a substitution of either jurors or judges in the course of the trial and it is difficult to conceive that it could be seriously contended that a juror who had not seen all of the witnesses and heard their testimony could be substituted for one who had originally sat.

The basis of the holding in the *Patton* case that a defendant in a criminal case might waive trial by jury and be tried before the Court was:

> "* * * There is no Act of Congress requiring that the trial of offenses shall be by jury and *a Court is fully organized and competent for the transaction of business without the presence of a jury.*" *

A Court is not, however, "fully organized and competent for the transaction of business" without the presence of a judge empowered to perform *all* the duties of a judge in the particular matter before him.

There is no distinction, according to the *Patton* case, in the "power" of a Federal Court to try a case by jury or before the Court without a jury, in the event that a defendant has consented to the latter mode of trial. It must necessarily follow that if the trial judge may be changed in the course of a jury trial, a like change may be made in the course of a trial before the Court without a jury and the guilt or innocence of the defendant be, therefore, determined by a substituted judge who had neither seen all or any of the witnesses nor heard all or any of their testimony. This, we submit, would be manifestly a denial of due process of law.

The trial court was not "fully organized and competent" for the transaction of the business of concluding the trial of this case because it was not presided over by a judge empowered to perform all the duties of a judge therein. There is no decision of this Court which holds

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*The italics are those of this court and appear in 281 U. S. 276 at 299, 74 L. Ed. 854 at 864.

that a conviction had in a court which is not "fully organized and competent for the transaction of business" is not a nullity.

A defendant in a criminal case may not waive any step in the proceedings necessary to constitute due process of law. The Circuit Court of Appeals in this case used the following language:

> "Defendant urges, however, that he has not been accorded due process. As we have said above, the jurisdiction of the Court to try the case is subject to the controlling provisions of the Constitution. The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property, without due process of law. We take it that any waiver of the defendant would be ineffectual if it went so far as to deny him due process of law." [R. 1950.]

In *Hopt v. People of the Territory of Utah,* 110 U. S. 574 at 579, 28 L. Ed. 262 at 265, this Court held that a defendant in a criminal case could not waive the elimination of any step necessary to constitute due process of law.

For the foregoing reasons it is respectfully contended that a Writ of Certiorari should be granted and the judgments of conviction should be reversed.

MARK L. HERRON,
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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 192

JOSHUA F. SIMONS, WILLIAM MARKOWITZ, AND SAMUEL MARKOWITZ, PETITIONERS

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1944–1999) is reported in 119 F. (2d) 539.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 21, 1941 (R. 1999–2000). Petition for rehearing was denied May 22, 1941 (R. 2000). The petition for writ of certiorari was filed June 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See

also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the accused may effectively consent to the completion of a jury trial before a substitute judge, when the first judge becomes incapacitated by illness after all the evidence has been introduced but before the jury has been instructed and final arguments completed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of Article III, Section 2 and the Sixth Amendment to the Constitution, relevant to the right to trial by jury in criminal cases, and of Section 24 of the Judicial Code relating to the jurisdiction of district courts, are set forth in the Appendix, *infra,* p. 13.

STATEMENT

Petitioners were convicted and sentenced in the United States District Court for the Western District of Washington, under an indictment charging violations of the Mail Fraud Statute (18 U. S. C. § 338) and the Securities and Exchange Act of 1933 (15 U. S. C. § 77 (q) (a) (1)) and for conspiracy to violate both acts (18 U. S. C. § 88) (R. 2–75).[1]

[1] Petitioners Joshua F. Simons and William Markowitz were convicted on all thirteen counts (R. 165–166), and were sentenced to imprisonment aggregating eight years and one day and to pay fines totalling $10,000 each (R. 183–193). Petitioner Samuel Markowitz was convicted on three counts (R. 166–167) and sentenced to imprisonment aggregating three years and one day (R. 181–182).

The trial commenced before Judge Cushman (R. 77), of the Western District of Washington, and after 127 witnesses were heard over a period of more than five months, the Government rested its case (R. 1828). None of the defendants testified or called any witnesses. After Government counsel's opening argument to the jury as well as arguments on behalf of two of the defendants had been presented, and while argument on behalf of a third defendant was in progress, the trial judge was stricken with a heart attack (R. 1844). When it became apparent that Judge Cushman would be unable to proceed (R. 1862), the parties appeared before the Honorable Leon R. Yankwich, District Judge of the United States for the Southern District of California, who had been duly authorized to preside over the District Court of the United States for the Western District of Washington (R. 78, 177, 236, 1844–1846). In open court, and with the benefit of advice of counsel, each petitioner indicated his desire that Judge Yankwich conclude the trial, and each waived "any question that may arise or could be raised by present or future counsel regarding the legality" of the substitution (R. 1847–1852, 1863–1869). Counsel for the petitioners in open court "approved" the substitution and stated, "the intention is to take no advantage whatever, to waive any possible claim of error on account of the substitution" (R. 1851–1853). Counsel for the Government thereupon consented to the substitution (R. 1853).

Then, by written stipulation, petitioners "being fully advised in the premises as to their legal and constitutional rights," requested that the trial "be completed" before Judge Yankwich and that he "preside in the trial of said cause, hear arguments of counsel for defendants and for the Government, instruct the jury, receive the verdict, sentence any and all defendants convicted, settle the Bill of Exceptions, and do any and all acts necessary and proper in the conduct of the trial of said cause and proceedings subsequent thereto as fully and completely as the said Honorable E. E. Cushman might or could do * * * waiving any and all legal and constitutional rights which they may have or might have by reason of the substitution * * *." Petitioners further stipulated that Judge Yankwich had been furnished a transcript of all the evidence and that he had "sufficient knowledge of the evidence to prepare the necessary instructions to the jury and to pass upon requested instructions" (R. 1859–1860).

The arguments to the jury were completed (R. 1869) with Judge Yankwich presiding, and he instructed the jury (R. 1869–1930). Following the jury's verdict of guilty, petitioners filed a motion for a new trial, which was denied, but the substitution of judges was not alleged as a ground for the motion (R. 168–179). On appeal to the Circuit Court of Appeals for the Ninth Circuit, petitioners assigned error upon the ground that Judge

Yankwich "had no jurisdiction" to complete the trial "and in so doing he violated" their rights under the Fifth Amendment to the Constitution (R. 396–397).

The Circuit Court of Appeals held that petitioners had waived any right they might have possessed to have the same judge preside throughout the trial and that the trial court had the power to give effect to the waiver.

ARGUMENT

The holding of the Circuit Court of Appeals that petitioners had validly waived any objections to the substitution of Judge Yankwich, is plainly correct and does not present any conflict of decisions warranting certiorari.

1. Petitioners contend that the constitutional guarantees of the right to trial by jury require the presence of a judge who is qualified (a) "to advise the jury on the facts" and (b) "to set aside the verdict * * * if, in his opinion, it is against the law or the evidence" (Pet. 10–14). Upon the assumption that Judge Yankwich was not qualified in either respect since he had not observed the demeanor of the Government's witnesses, they argue that his substitution—even at their express request—operated to deprive them of their right to a jury trial.

(a) We submit, however, that even if the right to the continuous presence of a judge who has

heard the testimony is an essential element of the right to trial by jury (see p. 7, *infra*) no reason appears why petitioners by their freely and intelligently given waiver could not forego that right. To have the same judge preside throughout the trial is no more vital to the right of the accused than the right to a verdict of twelve. Yet it is settled that an accused may "waive trial by a jury of twelve or consent to a trial by any lesser number, or by the court without a jury." *Patton* v. *United States,* 281 U. S. 276, 290. Similarly, an accused may waive other elements of a jury trial as defined by the Sixth Amendment which more directly reach his fundamental rights than does the substitution of judges.[2] If such rights may be waived, there can be no reason why the substitution of one qualified judge for another under the circumstances of this case should be forbidden.

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[2] Thus, he may waive his right to a "speedy trial," *Pietch* v. *United States*, 110 F. (2d) 817, 819 (C. C. A. 10th, 1940), certiorari denied, 310 U. S. 648; *Daniels* v. *United States*, 17 F. (2d) 339, 344 (C. C. A. 9th, 1927), certiorari denied, 274 U. S. 744; *Worthington* v. *United States*, 1 F. (2d) 154 (C. C. A. 7th, 1924), certiorari denied, 266 U. S. 626; *Phillips* v. *United States*, 201 Fed. 259, 262 (C. C. A. 8th, 1912); by a jury "of the state and district wherein the crime shall have been committed," *Hagner* v. *United States*, 54 F. (2d) 446, 447–449 (App. D. C., 1931), affirmed, 285 U. S. 427, "to be confronted with the witnesses against him," *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4th, 1925); certiorari denied, 268 U. S. 691; *Fukunaga* v. *Territory of Hawaii*, 33 F. (2d) 396, 397 (C. C. A. 9th, 1929), certiorari denied, 280 U. S. 593; and "to have the assistance of counsel

Freeman v. *United States*, 277 Fed. 732 (C. C. A. 2d), upon which petitioners rely as establishing a contrary rule (Pet. 7–8, 16), was plainly overruled by this Court in *Patton* v. *United States, supra*. As the court below pointed out (R. 1947), and as the Second Circuit has subsequently held, the *Freeman* case is based upon the premise that the accused may not waive the right to trial by jury, and that premise was "wholly removed" by the opinion of this Court in the *Patton* case. *Cahill* v. *Mayflower Bus Lines*, 7 F. Supp. 869, 872 (S. D. N. Y.); affirmed, 77 F. (2d) 838, 840 (C. C. A. 2d).

(b) Furthermore, the record explicitly shows that petitioners' waiver did not deprive them of the protection guaranteed by the jury trial provisions of the Constitution. It is clear that Judge Yank-

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for his defense." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463; *Williams* v. *Sanford*, 110 F. (2d) 526, 527 (C. C. A. 5th, 1940), certiorari denied, 310 U. S. 643; *Moore* v. *Hudspeth*, 110 F. (2d) 386, 388 (C. C. A. 10th, 1940), certiorari denied, 310 U. S. 643; *Harpin* v. *Johnston*, 109 F. (2d) 434, 435 (C. C. A. 9th, 1940), certiorari denied, 310 U. S. 624; *Buckner* v. *Hudspeth*, 105 F. (2d) 396, 397 (C. C. A. 10th, 1939), certiorari denied, 308 U. S. 553; *Zahn* v. *Hudspeth*, 102 F. (2d) 759, 761 (C. C. A. 10th, 1939), certiorari denied, 307 U. S. 642.

These requirements "are all of first importance" (*United States* v. *Wood*, 299 U. S. 123, 143), and were specifically enumerated in the Constitution because of the "anxiety of the people" that they be distinctly recognized "in the supreme law of the land." *Callan* v. *Wilson*, 127 U. S. 540, 549.

wich was fully qualified to comment on the evidence, had he chosen to depart from his usual custom not to do so (R. 112), and to set aside the verdict if the evidence had been insufficient to support it.[3] Petitioners expressly stipulated that he had "sufficient knowledge of the evidence to prepare the necessary instructions to the jury and to pass upon requested instructions" (R. 1860).

Moreover, while the Constitution requires "the superintendence of a judge" (*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13), it is not altogether clear that the right to trial by jury includes the right to have a judge qualified to comment upon the credibility of the witnesses, as petitioners assume (Pet. 12, 13). Full effect may be given to the requirement of superintendence by the presence of a qualified judge to conduct and control the trial (*The People* v. *Kelly*, 347 Ill. 221, 233 (1932)), and "to state or sum up the evidence." *Bannister* v. *Lucas*,

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[3] The record shows that Judge Yankwich "read the entire printed record in the case, including the exhibits" (R. 1864) and that he had the benefit of a draft of instructions prepared by Judge Cushman which were embodied in his charge (R. 1866). In their assignment of errors, petitioners complained of only one instruction given to the jury (R. 396), and that was challenged solely on legal grounds which in no way involve the credibility of testimony. And, since petitioners called no witnesses on their behalf, and each of the 127 witnesses for the Government testified to facts showing their guilt, there could have been no such conflict of testimony as would require the court to comment upon the witnesses' demeanor.

21 Hawaii 222, 233, 234 (1912).[4] Again, that the judge's opinion on the facts is not "a constituent part of the fundamental right" to trial by jury (*Bannister* v. *Lucas, supra,* p. 230) is apparent from the fact that in the great majority of jurisdictions judges are forbidden from commenting on the evidence. See, *Journal of the American Judicature Society,* October, 1928 (Vol. XII, No. 3, pp. 76–82).

Similarly, petitioners were obviously not prejudiced by the denial of their motion for a new trial based upon the insufficiency of the evidence (R. 168–169, 178), for they do not challenge the holding of the court below that (R. 1998–1999): "The undisputed evidence in the case, *entirely unattacked as to credibility* conformed to no other hypothesis than guilt." [Italics supplied.] In any event, as petitioners admit (Pet. 14), Section 776 of the Judicial Code specifically authorized him to rule on the motion, and the validity of that statute has been uniformly accepted.[5] Wholly apart from statute, it

[4] While it is sometimes loosely said that the "practice of such comment" was an "inseparable part of jury trial," at common law, *Wigmore on Evidence* (3rd ed.), § 2551; cf. *Quercia* v. *United States*, 289 U. S. 466, 468, 469, it is clear that at common law it was merely a practice which the judge could follow in his discretion, and not a matter of fundamental right which the accused could demand. *Smith* v. *Carrington*, 4 Cranch 62, 71.

[5] See *United States* v. *Meldrum*, 146 Fed. 390, 391–396 (D. C. Ore.), affirmed, 151 Fed. 177, 182 (C. C. A. 9th); *King* v. *United States*, 25 F. (2d) 242, 244 (C. C. A. 6th);

is generally held that a successor judge has the inherent power to rule upon a motion for a new trial, as long as a record of the proceedings has been preserved.[6]

2. Petitioners alternatively contend that Judge Yankwich was without statutory authority to complete the trial and that the consent of the parties was therefore ineffectual to confer jurisdiction upon him (Pet. 14–16). Petitioners do not deny, however, that the trial court had general jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C., § 41 (2)). "This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the United States, subject to the controlling provisions of the Constitution." *Patton* v. *United States, supra,* p. 299. Since there is no constitutional nor statutory prohibition against the substitution of trial judges, the District Court had inherent power to give effect to the waiver[7]

Ziang Sun Wan v. *United States*, 289 Fed. 908, 914 (App. D. C.), reversed on other grounds, 266 U. S. 1; *Walker* v. *United States*, 113 F. (2d) 314, 316 (C. C. A. 9th); and compare *State* v. *Messino*, 325 Mo. 743, 753–760 (1930).

[6] *People* v. *Rao*, 271 N. Y. 98, 102, 103 (1936); *Commonwealth* v. *Gedzium*, 261 Mass. 299, 308 (1927); *People* v. *Genesee Circuit Judge*, 227 Mich. 538, 540 (1924); *The People* v. *McConnell*, 155 Ill. 192, 201 (1895); see *New York Life and Fire Insurance Co.* v. *Wilson*, 8 Pet. 291, 303.

[7] *Toledo, St. L. & W. R. Co.* v. *Perenchio*, 205 Fed. 472 (C. C. A. 7th), certiorari denied, 231 U. S. 745; *Bailey* v. *Texas Co.*, 47 F. (2d) 153, 155 (C. C. A. 2d).

and to proceed to the conclusion of the trial.[8] Obviously, the mere change of incumbents could not defeat the jurisdiction of the court.[9]

3. Finally, petitioners contend that they have been denied due process of law because the judgment of conviction was entered by a court which was not "fully organized and competent for the transaction of business" (Pet. 10, 17–18). We have shown, however, that the court had complete jurisdiction. There has been no deprivation of petitioners' constitutional rights, and the procedure followed plainly conformed to the requirements of due process.[10]

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[8] Cf. *Pointer* v. *United States*, 151 U. S. 396; *Chin Wah* v. *United States*, 13 F. (2d) 530 (C. C. A. 2d, 1926) *Ex parte Peterson*, 253 U. S. 300; *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642. See also *Ackerson* v. *United States*, 15 F. (2d) 268, 270 (C. C. A. 2d, 1926), certiorari denied, 273 U. S. 702.

[9] No contention is made that Judge Yankwich was not a regularly qualified United States Judge properly designated by the Senior Circuit Judge pursuant to R. S. §591 (R. 78, 1846, 1867), nor that petitioners' request that he complete the trial and their waivers of objections were incompetently made because of ignorance or duress upon them. Nor is it denied that either Judge Cushman or Judge Yankwich was present at all stages of the proceedings.

[10] Cf. *People* v. *Casselman*, 10 Cal. App. 234, 237 (1909); *People* v. *Henderson*, 28 Cal. 465, 474 (1865); *State* v. *McCray*, 189 Iowa 1239, 1243–1247 (1920); *Sergent* v. *Commonwealth*, 133 Ky. 284, 290, 291 (1909); and *Burrage* v. *State*, 101 Miss. 598, 605, 606 (1912). See also, *Mason* v. *State of Ohio*, 5 Ohio C. C. N. S. 113 (1904); *Com. of Pa.* v. *Claney*, 113 Pa. Super. Ct. 439 (1934); *Durden* v. *The People*, 192 Ill. 493; *Blend* v. *The People*, 41 N. Y. 604, 606 (1870).

CONCLUSION

The decision of the Circuit Court of Appeals is correct and does not present any conflict warranting certiorari. Therefore, it is respectfully submitted that the petition should be denied.

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JULY 1941.

APPENDIX

Article III, Section 2, of the Constitution of the United States provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. * * *

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section 24 of the Judicial Code, as amended (28 U. S. C., § 41), provides in part:

> The district courts shall have original jurisdiction as follows: * * *
>
> Second. Of all crimes and offenses cognizable under the authority of the United States.

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Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

The statement, in the respondent's brief, of the question presented, is not precisely accurate. The question is not:

> "Whether the accused may effectively consent to the completion of a jury trial before a substitute judge, when the first judge becomes incapacitated by illness after all the evidence has been introduced but before the jury has been instructed and final arguments completed" (Resp. Br. p. 2),

but as stated on page 6 of our petition:

> "* * * whether the substitution, pursuant to stipulation and after all the evidence had been taken,

of one judge for another in the course of the trial of a criminal case before a jury, and the instruction of the jury by the substituted judge who had not seen the witnesses nor heard their testimony but had merely read it, deprived petitioners of their constitutional right to trial by jury, or is such a departure from established judicial procedure as to deprive the petitioners of their liberty without due process of law."

Boiled down to its very essence, the question is this: In a trial by jury, is a substituted judge who has not seen any of the witnesses nor heard their testimony, empowered to instruct the jury on the law and to *advise them on the facts?*

This Court has held that a trial by jury is, among other things, one held "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts * * *".

Patton v. U. S., 281, U. S. 276 at 289; 74 L. Ed. 854 at 858-59;

Capital Traction Co. v. Hof, 174 U. S. 1 at 13-14; 43 L. Ed. 873 at 878.

The necessary corollary of the question here presented is: Is a trial presided over by a judge not empowered to perform all the duties of a trial judge,—that is before a judge not empowered to advise the jury on the facts—a trial before a duly constituted court?

The holding in the *Patton* case that the accused might waive his right to trial by a jury of twelve, was based in the final analysis upon the proposition announced and italicized by this Court in its decision in that case:

> "* * * and a court is fully organized and competent for the transaction of business without the presence of a jury." (281 U. S. 276 at 299; 74 L. Ed. 854 at 864),

and obviously does not decide the contention here presented, which is that petitioners were convicted in a court not fully organized and competent for the transaction of the business of the trial there at bar.

As urged in petitioner's opening brief, at pages 15-16, if the substituted judge was empowered, by virtue of his commission and his designation and assignment, to perform all the duties of a trial judge in the instant case, the stipulation, which respondent stresses, was unnecessary and served no purpose. If the judge was not so empowered, he could not be empowered by stipulation, as courts are constituted and empowered only by law. They cannot be constituted, nor can power to perform functions be conferred on them by stipulation.

No question of the jurisdiction of the District Court of the Western District of Washington is involved. The judge is not the court, but merely an officer of the court. The question is whether a court, presided over by a substituted judge, who has not seen the witnesses nor heard their testimony but has merely read it, is duly constituted and the substituted judge empowered to instruct the jury.

Respondent has misconceived, or ignored, the scope of petitioners' argument. The burden of respondent's argu-

ment (Resp. Br. pp. 5-6) is to the effect that, as the *Patton* case held that a defendant may waive the right to a jury trial, he may waive any element of such trial. Respondent then states (Resp. Br. p. 6):

> "* * * If such rights may be waived, there can be no reason why the substitution of one *qualified* judge for another under the circumstances of this case, should be forbidden." (Italics supplied.)

This begs the entire question by *assuming* that the substituted judge was *qualified.* The word employed in petitioners' brief, (pp. 11, 13, 14, 15, 16, 17) and used by this Court in the *Patton* and the *Capital Traction* cases, *supra,* is "empowered", and we assume that the word "qualified" is used by respondent as a synonym for "empowered".

The question is not one of the relative importance of conceded rights (Resp. Br. p. 6), but is one of power. It does not follow that, because a defendant may waive trial by jury or details of procedure (Resp. Br. p. 6), before a duly constituted court, he may waive the presence of a duly constituted court presided over by a duly empowered judge.

Respondent also states (Resp. Br. p. 8):

> "* * * it is not altogether clear that the right to trial by jury includes the right to have a judge qualified to comment upon the credibility of the witnesses, as petitioners assume."

Petitioners do not *assume* this principle, but base their statement upon the fact that this Court, in the *Patton* and *Capital Traction* cases, *supra,* declared it to be the law.

In support of its contention, respondent cites a number of State cases and one Hawaiian case. Respondent then sums up the holdings of these cases as follows (Resp. Br. p. 9):

> "Again, that the judge's opinion on the facts is not 'a constituent part of the fundamental right' to trial by jury (*Bannister v. Lucas, supra,* p. 230) is apparent from the fact that in the great majority of jurisdictions judges are forbidden from commenting on the evidence."

It may be conceded that judges are so forbidden in the great majority of jurisdictions. But this Court has held that in the jurisdiction in which this cause was tried, the law is to the contrary and that it is the duty of the judge, in the exercise of a sound judicial discretion, to determine whether or not he should do so.

Patton v. U. S., supra;

Capital Traction Co. v. Hof, supra.

We submit that respondent's contention that the *Patton* case overruled *Freeman v. U. S.,* 227 F. 732, is not sound. The question decided in the *Freeman* case was the same as the one in this case, namely, may the jury be instructed by a substituted judge who has not seen the witnesses nor heard their testimony, but has merely read it. The question decided in the *Patton* case was whether a defendant in a criminal case could effectively consent to trial by a jury of less than twelve, before a duly constituted court. The *Freeman* case is not mentioned in the *Patton* case. Some of the dicta in the *Freeman* case is inconsistent with the decision in the *Patton* case, but the *decision* and the principal reasons upon which the decision in

the *Freeman* case was based are in no wise inconsistent with the *decision* or the reasoning in the *Patton* case.

The Second Circuit did not hold in *Cahill v. Mayflower Bus Lines,* 77 F. (2d) 838, as respondent contends (Resp. Br. p. 7), that the *Patton* case overruled the *Freeman* case, nor did that case hold that the *Freeman* case is based solely upon the premise that the accused may not waive the right to trial by jury. In *Cahill v. Mayflower Bus Lines, supra,* the Court stated at page 840:

> "In Freeman v. United States, 227 F. 732, this court held a judge could not be substituted for another during the taking of testimony because a substituted judge would be unable to advise the jury about the value of the testimony and that a defendant was not free to waive a jury trial. It is now authoritatively decided a defendant may waive a jury. Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.",

and merely held that a substituted judge could rule on a reserved motion for a directed verdict, the determination of which required only the construction of written instruments. The *Patton* case did not hold that one judge could be substituted for another during or after the taking of testimony.

The statement in respondent's brief (p. 9) that:

> "Similarly, petitioners were obviously not prejudiced by the denial of their motion for a new trial based upon the insufficiency of the evidence [R. 168-169, 178] for they do not challenge the holding of the Court below that [R. 1998-1999]: 'The undisputed evidence in the case, *entirely unattacked as to credibility,* conformed to no other hypothesis than guilt.' (Italics supplied)",

is mere *ipsa dixit* and is, in our opinion, fully answered on page 13 of petitioners' opening brief.

Respondent states in footnote 4 on page 9 of its brief:

> "While it is sometimes loosely said that the 'practice of such comment' was an 'inseparable part of jury trial', at common law, *Wigmore on Evidence* (3rd ed.), Sec. 2551; cf. *Quercia v. United States,* 289 U. S. 466, 468, 469, it is clear that at common law it was merely a practice which the judge could follow in his discretion, and not a matter of fundamental right which the accused could demand. Smith v. Carrington, 4 Cranch 62, 71."

Petitioners contend that this Court did not use loose language in the *Quercia* case, *supra,* the *Patton* case, *supra,* or the *Capital Traction* case, *supra.* If, as stated by respondent, commenting on the evidence is a practice which the judge may follow *in his discretion,* it must necessarily follow that there must be a judge "empowered" to exercise this discretion. Petitioners contend, and Judge Yankwich in effect instructed the jury [R. 1869-1870], that he was not so empowered.

For the foregoing reasons, and for the reasons stated in the petition and in petitioners' opening brief, petitioners respectfully contend that a Writ of Certiorari should be granted and the judgments of conviction should be reversed.

Respectfully submitted,

MARK L. HERRON,
Attorney for Petitioners.